STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

CHARTER TOWNSHIP OF COLOMA,

Plaintiff-Appellee,

v

BERRIEN COUNTY, BERRIEN COUNTY SHERIFF'S DEPARTMENT, LANDFILL MANAGEMENT CO., and HENNESSY LAND CO.,

Defendant-Appellants,

Court of Appeals Docket No. 325226
Lower Court Case No. 13-0317-CZ-D
Berrien County Circuit Court

Supreme Court Docket No. 154556

JOE HERMAN, *et al,*

Plaintiff-Appellees,

v

BERRIEN COUNTY

Defendant-Appellants.

Court of Appeals Docket No. 325335
Lower Court Case No. 05-3247-CZ-M
Berrien County Circuit Court

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APPELLANTS' REPLY BRIEF

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Correction of Misstated Facts

Appellees continue to misstate the facts of this case. They continue to use "courthouses" as part of their example list for the siting and erecting of buildings in the County Commissioner's Act; MCL 46.1 *et seq*. ("CCA"). (See for example: *Herman* Plaintiffs/Appellees brief, pg 3). MCL 46.11(b) regarding the determination of new sites for county buildings does not contain an example list and as a result, does not mention "courthouses", and MCL 46.11(d), talks about erecting necessary buildings, but does not include "courthouses" in its list of example buildings. Appellees are attempting to use MCL 46.11(a) which talks about the lease or purchase of real estate and gives "courthouses" in its example list, however that section does not discuss siting or erecting a courthouse or any other county building. While this is one example of Appellees playing "loose and fast" with the facts, Appellants agree that the term "other county buildings" as set forth in MCL 46.11(d) should be read to include county courthouses, and contrary to Appellees position, all other county owned buildings.

Appellees also continually refer to the Gun Range Building as a "structure" intimating that it is something less than a "building". The Coloma Charter Township ordinance specifically defines "building" in such a way to include the Gun Range Building and the Trial Court and both the Court of Appeals and majority opinion (despite what Appellees claim in their briefs) and the dissent all hold that the Gun Range Building is, in fact, a building. (See: Herman Plaintiffs/Appellees brief, p 16; *Coloma Charter Twp v Berrien Cnty*, 317 Mich App at 132 fn 3; 156 and 156 fn 6.)

Coloma Township also argues that the County did not appeal the Court's ruling in the case of *Coloma Charter Twp v Coloma Rod & Gun Club*, Berrien County Trial Case No. 10-0378-CH-d. (See: Coloma Plaintiffs/Appellees brief, pg 6) While technically correct it is misleading and disingenuous as the County was not a party to that case. (See: Defendant-

Appellants Appendix 27a)[1]. In addition, there were no county buildings involved in that case, and the County had no reason or basis to assert its right to conduct firearms training at the private club based upon the CCA.

Argument

I. NOT ONLY DID THE COURT OF APPEALS INCORRECTLY HOLD THAT BERMS AND OTHER OUTDOOR PORTIONS RELATED TO THE COUNTY'S GUN RANGE BUILDING DO NOT HAVE PRIORITY OVER THE COUNTY COMMISSIONER'S ACT ("CCA"), BUT WHOLLY FAILED TO CONDUCT ANY PROPER ANALYSIS OF THE *INDISPENSABLE TEST* AS SET FORTH IN THIS COURT'S OPINION IN *HERMAN V BERRIEN COUNTY,* 481 MICH 352 (2008).

For a proper analysis of this Court's prior ruling in *Herman supra,* one only need look at the well-reasoned dissenting opinion written by Judge Markey which properly analyzed and applied this Court's decision in *Herman*, including the "Indispensable Test" formulated by this Court to the facts of this case. Appellees, in their response briefs, make various arguments that were either, 1) refuted or deemed unavailing by Judge Markey in her dissent, 2) were either not part of the majority opinion or, 3) as in the case of the argument related to the definition of building, were soundly discredited by both the majority and the dissenting opinions in the Court of Appeals. The following argument is in reply to the principal arguments raised by Appellees in their briefs:

A. The Gun Range Building is a county building. Appellees first argue, as they did in the Court of Appeals, that the Gun Range Building constitutes a "structure" and not a "building" for purposes of the CCA. This would be an interesting argument, if, in fact the Township's own ordinances did not define it as a building (see: *Coloma* at 156, fn 6), and if, in fact, every Judge that has reviewed this issue, including the Trial Judge and all three Judges of

[1] The County was never a party to that case as it involved a privately owned Gun Range. The County didn't have standing to intervene as nothing more than a patron of the Private Gun Range and hence, did not participate or appeal.

the Court of Appeals, had not unanimously agreed that in order to determine the meaning of the term "building" as used in the CCA, one must look to the dictionary definition of "building". Appellees are left with the disingenuous argument that the Court of Appeals majority statement in footnote 3, which states that Judge Markey properly used the dictionary definition of building (See: *Coloma*, p 132, fn3) was not a finding or a holding and thus, the majority did not agree that the Gun Range Building constituted a building. The Court of Appeals made no such declaration and the issue of the Gun Range Building being a county building is not an issue on which any of the reviewing judges have disagreed.

Appellees repeat the already failed argument that they made in the Circuit Court and the Court of Appeals, which was resoundingly discredited by Judge Markey, and now asks this Court to utilize the doctrine of *ejusdem generis* as opposed to the dictionary definition so as to define "building" as being restricted to "courthouses, jails and clerk's office", and to "include[e] only things of the same kind". Judge Markey summarized the Circuit Court opinion on this issue as follows:

> "The circuit court in its initial opinion and order also rejected plaintiffs' argument that the structure could not be a county "building" because it was not listed in the examples noted in MCL 46.11(d)[1], as cited in *Herman*, 481 Mich 367, n 14. The court ruled that the statute was clear and unambiguous and that "county buildings" included any "buildings" that are "owned, leased, operated, used or maintained by a county for activities authorized by law." The circuit court further ruled that the county's motive (to avoid *Herman*) was not relevant but rather what mattered was the result of the county's actions." *Coloma Charter Twp v Berrien Cnty*, 317 Mich App 144; 894 NW2d 623 (2016).

[1]Note that county courthouses are not listed in that subsection, either and Appellees' resort to reference to MCL 46.11(a) to supply courthouse to the mix of buildings listed, when, in fact, MCL 46.11(d) talks about siting buildings where MCL 46.11(a) talks about constructing them. In any event, the attempt to narrow the definition of building from the dictionary definition to something less than that is inappropriate.

Judge Markey went on to discuss *Pierce v City of Lansing*, 265 Mich App 124 (2005) and *Ali v Detroit*, 219 Mich App 581 (1996), two cases holding it appropriate to use a dictionary definition to define a term not defined in a statute, and stated:

> "I find these cases important because they discuss the plain meaning of the term "building" which also is at issue in the present cases. So because the analysis in *Pierce* and *Ali* regarding the plain and ordinary meaning of the undefined term "building" is based on the proper technique of consulting dictionary definitions for that purpose, *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012), they are worthy of consideration regarding the plain meaning of the term "building" as used in the CCA. Furthermore, individual words in a statute must be read in context and in light of the purpose of the statute as a whole. *Herman*, 481 Mich at 366; *Sun Valley Foods*, 460 Mich at 237.
>
> For these reasons, the circuit court correctly relied on *Ali* and dictionary definitions to determine that the shooting-range structure was a building within the meaning of the CCA.
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> ***
>
> "Plaintiffs present several unavailing arguments contrary to the conclusion that the shooting range building used for discharging firearms has priority over the township's zoning ordinance. Plaintiffs first argue that the shooting range building is not "necessary" as that term is used in MCL 46.11(d) and that the phrase "necessary buildings for jails, clerks' offices, and other county buildings" limits the county's authority to "erect" and "site" buildings. Plaintiffs' cite no authority for this argument. It is settled that an argument presented without supporting authority is abandoned on appeal. See *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). On the other hand, defendants cite *Pittsfield*, in which this Court opined that "the legislature expressly stated only one limitation on the authority of the county to site "buildings," and that "the Legislature, by explicitly turning its attention to limits on the county siting power and deciding on only one limitation, must have considered the issue of limits on the county siting power and deciding on only one limitation, must have considered the issue of limits and intended no other limitation." *Pittsfield*, 468 Mich at 711. The one limit is found in MCL 46.11(b), which restricts the siting of a county building with respect to "any requirement of law that the building be located at the county seat." *Coloma*, 317 Mich App at 154, 156-157.[2] [*emphasis added*]

[2] It should be noted that in *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702 (2003), the building at issue was a homeless shelter, which is not listed among or even related to the buildings set forth in the list provided for in MCL 46.11(d). As a result, out of whole cloth, Plaintiffs/Appellees have created a new definition of "necessary building" to include only "fully enclosed structures with walls, elevators, HVAC systems, bathrooms, indoor plumbing, electricity doors (with locks) and windows and are all used for conducting of indoor county business or services." Herman Plaintiffs/Appellees brief at p 18. This definition is found nowhere in any statute or case law and is cited without any authority. It would also exclude buildings such as animal exhibition areas in county

As can be seen by the foregoing, Appellees' arguments rely principally on "divining" some sort of a determination of "intent" or "real purpose" of the County as opposed to determining that a building has been constructed by the county for a purpose within its powers (a purpose that a County is authorized to undertake) and therefore, the county building is entitled to the protections of the CCA . Appellees would have this Court (and all courts) look behind the curtain, so to speak, to determine the real intent of why the County Commission decided to constitute a county building as a necessity. It is clear that Appellees, in this case, in spite of the fact that MCL 46.11(d) contains the term "and other county buildings", have attempted to restrict the definition of "building" and prohibit any building not specifically named as an example in the statute. That statutory language is to provide some examples of county buildings and not limit county buildings to only those specified.

B. <u>The Gun Range Building is a "necessary" county building as determined by the Board of County Commissioners through resolution.</u>

Appellees allege that by using the "dictionary" definition of the term "necessary" that the county building in question is not a "necessary building" and therefore, is not one of the buildings able to be erected under MCL 46.11(d). This is another of the Appellees' unavailing arguments presented to the Court of Appeals that was not discussed by the majority opinion but, in fact, was conclusively and decisively disposed of by Judge Markey's dissent. It is not, as Appellees assert, that the lower court and the dissent in the Court of Appeals did not properly define the term "necessary", but a dispute as to who gets to make that "legislative" decision. The

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fairgrounds, county grandstands, and arguably might even prohibit the use of airport terminals, since at least in the vision of the majority of the Court of Appeals and Appellees' in this matter, the airport primary purpose would be to land the planes and not for the housing and indoor business and services and therefore, the airport terminal would be nothing more than the "tail wagging the dog". In addition, Plaintiffs/Appellees also try to limit a county building as used in the CCA to buildings for "indoor county business" and no such limitation exists in the CCA. (See: Herman Plaintiffs/Appellees brief, p 27).

real dispute is over the level of review to be conducted by courts when a legislative body makes the determination that a building is "necessary". Unlike the majority opinion which ignored this argument, but instead wanted to quip about the tails wagging dogs, Judge Markey in her dissent, directly and cognitively discussed this argument:

> "I agree with the circuit court that the word "necessary" in MCL 46.11(d) only means that the county's authority to "erect" and "site" a building is limited to lawful purposes, i.e., ones not prohibited by a state statute or the Constitution. Contrary to plaintiffs' contention, the circuit court's ruling does not render the term "necessary" superfluous but rather recognizes the traditional limits of judicial review of legislative acts in our constitutional system of separation of powers. The circuit court correctly ruled that although the county acted through a resolution to move its agents to erect and site the shooting range building, this action was legislative. See that "passing a resolution to override rules promulgated by an executive branch agency is an inherently legislative action"; *Bengston v Delta Co*, 266 Mich App 612, 621-622; 703 NW2d 122 (2005) (noting legislative acts include passing an ordinance or resolution). Judicial review of legislative acts is deferential. For example, judicial review of the constitutionality of legislation is generally limited to whether the legislation has a rational basis. 'Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose.' *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). 'Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice.' *Id*. at 260 (citation omitted). '[I]f constitutionally empowered to act, 'the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination.'" *Charles Reinhart Co v Winiemko*, 444 Mich 579, 600 n 38; 513 NW2d 773 (1994), quoting *Black v Liquor Control Comm*, 323 Mich 290, 296; 35 NW2d 269 (1948). So, whether the shooting range building was 'necessary' was a legislative decision that the judiciary should not second guess." *Id.* [*emphasis added*] *Coloma*, 317 Mich App at 157-158.

Other examples of the limited standard of review to be applied to the term "necessary" or "necessity" as it relates to legislative acts may be found in the law related to of the Drain Code and Eminent Domain cases. See: *Hitchingham v Washtenaw County Drain Comm'r*, 179 Mich App 154 (1989); *Private Prop Owners v Gladwin County Drain Comm'r* 282 Mich App 142 (2009); *Battjes Builders v Kent Cty Drain Comm'r*, 15 Mich App 618 (1969). In fact, in eminent domain proceedings, the standard for review of a necessity determination is either fraud or abuse

of discretion by the local legislative unit. *Lansing v Jury Rowe Realty Co*, 59 Mich App 316 (1975); *Michigan State Hwy Comm v Cronenwett*, 52 Mich App 109 (1974) and *Michigan State Hwy Comm v Taylor*, 41 Mich App 601 (1972). As a result, it is clear that the Trial Court properly determined based upon the resolution adopted by the County Board of Commissioners that a rational basis exists for the determination that the Gun Range Building was a "necessary building," as that term is used in MCL 211.46(d).

C. The Court of Appeals misapplied the *Herman* test and erred in its determination that the firearms training range and berm were not indispensable ancillary land uses to the Gun Range Building.

This Court determined in *Herman* that the County had plenary authority and the power to site a building and that said power would be meaningless if the siting entity could not conduct "ancillary land uses in order to make normal use of the building". This Court then went on to establish the test to be used in order to determine whether or not a use is deemed to be an ancillary land use for purposes of making the normal use of a county building. This Court established the test as follows:

> "To answer that question a court must ask whether the ancillary land use is indispensable to the building's normal use." *Herman* at 368.

There is no case law or definitive answer setting forth the normal land use of a Gun Range Building and the majority of the Court of Appeals made no finding on this important issue. The closest that the Court of Appeals comes to even discussing the Gun Range Building and its normal use is set forth below:

> "The problem with the building constructed in front of the existing shooting range is that *it* is ancillary to the use of the shooting range, as opposed to the shooting range being ancillary to the normal use of the building. See Random House Webster's College Dictionary (2003) ("ancillary" is defined as "subordinate" or "subsidiary"). Indeed the shooting range existed long before the building, and

> was utilized (until the courts stopped its use) without the existence of the building. The evidence shows that the shooting range was and is the main feature of this activity, making the building subordinate to, or ancillary to, the shooting range." *Coloma*, 317 Mich App at 135.

It is clear from this Court's "Indispensable Test" that the first step in any analysis is for the Court to determine the normal use of the building. Without determining that use, a Court can never properly determine whether the ancillary land use at issue is indispensable to the building's normal use. Simply stating that the ancillary use existed first and was, in the Court's opinion, the "main feature"[3] and could exist without a building making the building ancillary to it, does not apply the "Indispensable Test" but turns it on its head and ignores this Court's statement in *Herman*, that "the sequence of construction is not dispositive" to the analysis. *Herman*, 481 Mich App 356, fn 3. The *Herman* plaintiffs/appellees go even further in their brief and state that the examples of ancillary land use as identified by the *Herman* court (ie driveways, parking lots, and light poles) are not uses of the land. See: *Herman* brief at pg 22, fn 5. This statement is, of course, made without any citation and is inconsistent with a parking lot (albeit one for paid parking) being a "use" requiring a special use permit[4]. (See section 12.04 of the Coloma zoning ordinance). In addition, this argument fails to consider the fact that this Court in *Herman*, specifically used parking lots, sidewalks and light poles as examples of the types of ancillary land uses for purposes of the CCA that would be necessary in order to make normal use of a building. *Herman* 481 Mich at 368.

Appellees also state that *Herman* could have easily been decided on the grounds that prohibition of outdoor shooting did not limit or impair access to, or use of, the classroom training

[3] Small airports can exist without terminals; plane hangars only exist because of the airport runways as a main feature, and outdoor swimming pools can exist without senior citizens or health facilities to give a few examples of the uses that this "main feature" test would exclude.

[4] Parking is also permitted, at least on a limited basis, as an "accessory use" in almost every other zoning district under the Cover Township Zoning Ordinance.

building for "indoor county business" (See: Herman brief, p 22, fn 5, p 27). It is clear from a reading of *Herman,* that that is not the basis on which it was decided and that it was decided on the test set forth above. Nor is there any such limitation in the CCA. Again, Judge Markey in her well-reasoned dissent, made short order of Appellees' argument in this regard. Judge Markey stated as follows:

> "I reject, as did the circuit court, plaintiffs' argument that outdoor shooting or outdoor firearms' training was the "primary" use of the property to which the building was the "ancillary" use. The county has the authority "to site' and 'erect' 'county buildings.'" *Herman,* 481 Mich at 366; MCL 46.11(b) and (d). When the county exercises this authority, the normal uses of the building have priority over local zoning and other local regulations to the contrary. *Herman*, 481 Mich at 362, n 13. The CCA does not otherwise authorize the siting of a particular land use apart from the siting of a building, but *Herman* held that a county may "conduct ancillary land uses in order to make normal use of the building." *Id*. at 366-368. And, "the ancillary land use will only have priority over local regulations if it is indispensable to the building's normal use." *Id*. at 369. Thus, the proper analysis is to initially determine the normal use of the sited and erected county building and then determine whether any non-building use is indispensable to the building's normal use. See *Herman*, 481 Mich at 369-370. "In order to decide if this ancillary land use is indispensable to the normal use of the county's building, we must define the normal use of the county's building." *Id*. at 369. As discussed in the preceding paragraph, the county's "normal" use of the shooting range building was discharging firearms for the purpose of law enforcement officer training and the adjacent outdoor shooting range was an indispensable ancillary use to the building's "normal" use." *Coloma,* 317 Mich App at 161-162. [*emphasis added*]

Judge Markey then specifically determined that the Circuit Court did not err, ruling that the use of the outdoor shooting range adjacent to the new Gun Range Building was ancillary and indispensable to that building's normal use. In doing so, she stated as follows:

> "Plaintiffs' arguments to the contrary are based on the false premises that the adjacent outdoor shooting range was being used for "outdoor shooting" and "outdoor firearms training". While it is true that bullets fired inside the building travel to targets outside the building and located in what had previously been used as an outdoor shooting range, and the fired bullets are restrained from leaving the county's property by berms, the discharge of the firearms (shooting) and the firearms' training occur within the confines of the building. Further, the facts are not disputed that the shooting range building was specifically designed and used for the purpose of shooting and firearms training from within the building. Consequently, shooting and firearms training are the normal uses of the shooting

> range building. "For purposes of CCA priority, a building's *normal use* only *extends to the actual uses of that particular building* because, again, that is the extent of the power granted to the county by the CCA." *Herman*, 481 Mich at 370 [*emphasis added*]. Thus, the adjacent outdoor shooting range provides an ancillary and indispensable use: the placement of targets at which to shoot and the construction of surrounding berms to insure the safety and protection of the surrounding community from fired bullets. *Id.* at 357, 368-369. *Coloma*, 317 Mich App at 160-161.

The *Herman* test requires that a court 1) determine the normal use of the county building at issue and then 2) determine whether the land uses in question are ancillary and indispensable to the building's normal uses. The facts clearly show that the normal use of the Gun Range Building is for discharging firearms for the purpose of law enforcement officer training. Applying the second prong of the test, as set forth above, to the undisputed facts of this case as the Trial Court did, a Court should then determine that the outdoor use of the pre-existing shooting range was intended as the target area connected to the building where the shooters are located, and that without it, the building's normal use cannot be accomplished. The Building is where the Deputy, whether in training or for certification purposes, stands and shoots down the range to the berm protected target area. As a result, Appellees arguments that the range and berm protected target area is not ancillary to the building and that the Indispensable Test has not been met are demonstrably false.

The test is not, as Appellees repeatedly assert, whether or not the ranges were the first and most prominent aspect of the facility to be constructed. (See *Herman* Defendants' brief at page 26, citing from the Michigan Court of Appeals majority opinion as quoted above). If the test established by this Court in *Herman* is properly applied, a reviewing Court must first determine the normal use of the building that has been sited or constructed under the CCA (which in this case is for firearms training), and then determine what ancillary uses are indispensable to that use. It is clear that without the outdoor range and target component to the

Gun Range Building, it would be impossible to conduct firearms training in the building. There simply would be no place for the rounds that are discharged to (within the building) be aimed at targets for any type of realistic and safe firearms training. As a result, arguing that the outdoor portion of the firearms range and berms (the ancillary use) is not one that is permitted under the CCA would render the stated and actual use of the Gun Range Building impossible.

Appellees next argue that the County should be prohibited from using previously existing infrastructure as an ancillary use to a newly constructed building, a corollary to its argument that the sequence of construction should be dispositive in this case. That is not only contrary to this Court's holding in *Herman* ("the sequence of construction is not dispositive to the analysis"), but as Judge Markey pointed out in her dissent, the County's authority to site a county building was only limited by "any requirement of law that the building be located at the county seat. MCL 46.11(b)" Judge Markey went on to determine that any ruling to the contrary would not allow a county to make use of previously existing facilities which may be a benefit to the taxpayers of the county. Judge Markey, in her opinion, stated as follows:

> "But *Herman* held only that the outdoor shooting ranges were not ancillary to a different, classroom-instruction-only building. The majority cites no language in the CCA to support its conclusion but instead relies on the idiom of "the tail wagging the dog". In my view, the dog in these cases is the CCA, which has supremacy over the tail, the Township's ordinances. Because the new structure is a "building," one must look to the language of the CCA for a basis to preclude the county from invoking its authority to "site" it. Principles of construction dictate that a statute must be enforced according to its plain terms. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005), and that "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999). "I read nothing in the CCA to preclude the county from exercising its authority to site buildings to take advantage of previously constructed infrastructure. And, for the reasons I discuss *infra*, I believe this previously constructed infrastructure is ancillary to the newly constructed county building and indispensable to its normal use. For these reasons I conclude that the circuit court's reasoning was sound in both cases and would affirm.

II. THE COURT OF APPEALS ERRED IN VACATING THE TRIAL COURT'S RULING REGARDING CIVIL CONTEMPT ATTORNEY'S FEES BECAUSE THE TRIAL COURT FOUND THAT THE COUNTY WAS IMMUNE FROM A CLAIM FOR ATTORNEY'S FEES AS COMPENSATORY DAMAGES AND THAT CORRECTLY MODIFIED ITS PERMANENT INJUNCTION AND FOUND NO WILLFUL ATTEMPT BY THE COUNTY OR ITS OFFICIALS TO AVOID THE COURT'S ORDER.

The Trial Court ruled, based on *In re Bradley Estate*, 494 Mich 367 (2013), that the attorney's fees being sought for civil contempt by Plaintiffs/Appellees could not be awarded as compensatory damages because of immunity granted by the Governmental Tort Liability Act; MCL 691.1401 *et seq* (GTLA). The majority of the Court of Appeals remanded the case regarding that ruling, not because it was legally wrong, but because the Court of Appeals had reversed the decision to modify the injunction by holding that the Gun Range Building and its ancillary shooting range and berms did not pass the "Indispensable Test" established by this Court in *Herman.* Because the Court of Appeals determined that there was no basis for modifying the injunction, it then remanded the issue of civil contempt attorney's fees to the Trial Court for review. (See *Coloma,* 317 Mich App at 136.)

Plaintiffs/Appellees now seek to reverse the Trail Court's ruling by asserting that the contempt involved is not civil contempt governed by this Court's ruling in *Bradley Estate*, *supra*. They do this by claiming that there exists not two types of contempt, (civil and criminal) but three types, and by inventing a completely new type of contempt that is not found anywhere in the case law. Michigan has historically recognized two types of contempt; civil contempt and criminal contempt. See*: In re Auto Club Insurance Assoc*, 243 Mich App 697 (2000). A person that is accused of contempt must be informed as to whether or not they are being accused of civil or criminal contempt. See: *In re Auto Club Insurance Assoc, supra*. Appellees, without

citation, have now created an entirely new, third type of contempt, which they refer to as "pure contempt" without any citation to any case which establishes this third category of contempt. Appellees argue that this new type of contempt is not related to any tort claim and therefore, the case of *In re Bradley Estate, supra* does not apply. Nothing could be further from the truth. First of all, there exists no new type of contempt in the Michigan case law or statutes referred to as "pure contempt". Contempt in the State of Michigan is either "civil contempt" or "criminal contempt". Even though the civil contempt may be contempt for violating or failing to enforce or comply with a court order, it remains civil contempt. See: *In re Bradley Estate, supra*. In fact, the 2005 case out of which the contempt motion and action occurred, and out of which the injunction was issued, had as its underlying basis, a claim against the county for violating a zoning ordinance which constitutes a nuisance, per se, and violating a noise ordinance which was alleged by Plaintiffs in that case to be a nuisance. (Herman Plaintiffs/Appellees Appendix, pgs 17b-27b). As a result, the injunctive relief was granted to abate a nuisance which is a form of tort in the State of Michigan. Appellants' respectfully assert that there is no logical basis on which to distinguish *In re Bradley Estate, supra* from the injunction and contempt proceedings issued and pursued in the 2005 case. As a result, the Trial Court was correct in its ruling denying attorney's fees for civil contempt based upon the County's immunity from tort liability pursuant to the GTLA.

Not only do *In re Bradley Estate* and the 2005 case filed by Appellees both have, as their underlying premises, tort claims, they both result from the failure of a government agent to follow or execute or take action consistent with a court order and Appellees seeking compensatory damages in the nature of attorney's fees as a compensatory remedy a civil

contempt is clearly governed by *In re Bradley Estate, supra*. The Supreme Court in *In re Bradley Estate*, 494 Mich at 393, stated as follows:

> "Given that the statutory language of MCL 600.1721 clearly permits the payment of compensatory damages to a petitioner for a noncontractual civil wrong, we thus hold that a civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose "tort liability".

This Court *In re Bradley Estate, supra*, goes on to state that its holding does not constrain the Court's statutory authority to order punishment, but really seeks to prescribe acts to meet out certain punishments for contemptuous acts beyond those contempt powers inherent in the judiciary. It suggests that the award of attorney's fees for violation of an injunction based upon a nuisance claim is compensatory and beyond the Court's inherent contempt powers.

On the other hand, a criminal contempt claim is governed by a different standard. The Court heard a claim regarding criminal contempt, which is not part of this appeal, and correctly held that the County is not immune from criminal contempt under the GTLA. After holding a hearing on the criminal contempt matter, the Court made the factual determination that there was no intentional violation of the Court's injunction and that the permanent injunction in question should be modified based upon the change in circumstances, rulings that would be equally applicable to a claim of civil contempt.

Nor does the award of attorney's fees act as a coercive award to force compliance with the permanent injunction because as stated above, the Trial Court specifically found that violation of the permanent injunction was not intentional and that due to changed circumstances (which existed at the time the alleged violation occurred), the permanent injunction should be modified.

The Appellees, in 2013, sought to obtain an order of contempt in the 2005 case, based upon violation of the permanent injunction entered by the Circuit Court on November 10, 2008,

after remand by this Court in *Herman.* There is some question as to whether or not the entered permanent injunction was ever properly served on the County in 2005 after it was entered. However, it is clear that the intent of the injunction itself was to prohibit the use of the shooting ranges as they then existed based on this Court's ruling in *Herman*, based upon the gun ranges failure under the facts as they existed in 2005, to meet the Indispensable Test.

It should be noted that between November 10, 2008, when the permanent injunction was issued and September 2013, (a period of more than four years) there is no claim of any violation of the permanent injunction. (See Defendant/Appellants Appendix pgs 5a-7a; Herman Plaintiffs/Appellees Brief pg 4). In 2013, after the County had lost its use of the privately owned Coloma Rod & Gun Club shooting ranges, its counsel reviewed this Court's opinion in *Herman*, and determined that, if a new county building was built (not the indoor training building at issue in *Herman*) which had as an indispensable ancillary use the range and berm protected targets, these uses would comply with this Court's ruling in *Herman*. As indicated by the Circuit Court's rulings in this case, once the County determined that the permanent injunction was, because of the construction of the Gun Range Building, more broadly worded than required by this Court's test and ruling in *Herman*, it immediately moved to modify the permanent injunction based on changed circumstances. The Court, after a hearing on the matter and after reviewing the affidavits and testimony, and relying on its prior knowledge of the case, determined that the County and its officials had not intentionally violated the permanent injunction and modified it based on changed circumstances, permitting the County to operate the Gun Range Building and its related range and berm protected targets. As a result, there was and is no factual basis for the award of attorney's fees. Now, Appellees attempt to obtain attorneys' fees for acts that were judicially approved and allowed by the Circuit Court's ruling to amend the injunction. It is not

appropriate for the Appellants to pay contempt based attorney fees for acts which were subsequently judicially approved by the very Court which issued the injunction.

Conclusion

For the foregoing reasons, Appellants respectfully request that this Court reverse the rulings of the Court of Appeals, reinstate the holdings of the Trial Court, and grant them costs, attorney's fees and such other relief as is just and proper.

Respectfully Submitted:

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